In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1794

OSCAR H. KLEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court or the Northern District of California, petitioner was convicted on three counts of willfully failing to file federal income tax returns, in violation of Section 7203 of the Internal Revenue Code of 1954, 26 U.S.C. 7203. He was sentenced to concurrent terms of six months' imprisonment. The court of appeals affirmed (Pet. App.). Petitioner here contends that he was prejudiced by the jurors' failure to heed the district court's admonition not to discuss the case among themselves during trial, that the jury was not properly instructed on the issue of willfulness, and that, although he was represented by retained counsel, he should also have been permitted to appear as counsel on his own behalf.

It was stipulated at trial that petitioner, a preparer of income tax returns, received taxable gross income of $10,621.55 during 1966, $17,504.23 during 1967, and $23,985.59 during 1968. The proof showed that petitioner filed no income tax returns until December 1971 for the years 1957 through 1968. At the time he filed, his failure to file was already under investigation by the Internal Revenue Service. The issue for the jury to decide was whether petitioner's prior failure to file had been willful.

1. Petitioner moved for a new trial on the basis of an affidavit signed by one of the jurors, stating that eleven of the fourteen jurors, disobeying admonitions of the court, had discussed the case among themselves during recesses and that nine of them had expressed premature opinions about petitioner's guilt. The district court denied the motion on the ground that petitioner had not shown that he had been prejudiced by the jurors' alleged misconduct. Petitioner apparently contends (Pet. 5-12) that such conduct constitutes *per se* grounds for reversal, citing *Winebrenner* v. *United States*, 147 F. 2d 322 (C.A. 8), certiorari denied, 325 U.S. 863. The question in that case, however, was whether the trial court could properly instruct the jurors that they could discuss and debate together about a case during the course of its trial; the Eighth Circuit concluded that such instructions were erroneous. In the instant case the court instructed the jury, consistently with *Winebrenner*, not to discuss the case until it was submitted to them. Thus there is no issue here concerning "the propriety of the admonition" (Pet. App. 3).

The court below properly determined that, in the absence of a showing of prejudice, the jurors' alleged disobedience of the admonition was not a basis for reversal (Pet. App. 3-4):

This is not a case that involves "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury." *Remmer* v. *United States*, 1954, 347 U.S. 227, 229 nor does it involve the influence of the press upon the jury. *Silverthorne* v. *United States*, 9 Cir., 1968, 400 F. 2d 627.

What is involved here is the premature discussion among the jurors themselves about the case. Assuming that there was juror misconduct, it is still true that not every incident of juror misconduct requires a new trial. * * * The test is whether or not the misconduct has prejudiced the defendant to the extent that he has not received a fair trial. * * *

The juror's affidavit here does not assert that any of the jurors relied upon any evidence outside of the record in reaching their verdict, nor does it assert that any of the jurors actually decided upon the defendant's guilt before the case was submitted to them. The trial judge carefully examined the affidavit's allegations and ruled that even if everything in the affidavit were true a new trial was not required. Though the judge expressed his disapproval of such juror conduct, he commented that "the question is whether such conduct prejudiced defendant's right to a fair trial by an impartial jury." He correctly observed that "the only genuine issue in dispute was defendant's state of mind. On this point the jury demonstrated its open-mindedness by requesting re-reading of the instructions on willfulness before bringing in its verdict." The trial judge therefore held that "[u]nder all these circumstances the Court finds that the affidavit does not present any questions which requires [sic] further inquiry and does not justify a new trial."

> When a wise and experienced judge, who presided at the trial and observed the jury, comes to such a conclusion, it is not for us to upset it. The trial judge "was in a better position than we are to determine whether what happened was prejudicial." * * *

2. Contrary to petitioner's contention (Pet. 12-13), the trial court properly instructed the jury on the issue of willfulness. The court charged that "willfully," as used in Section 7203, means "voluntary, purposeful, deliberate and intentionally, as distinguished from accidental, inadvertent, or negligent" (Pet. App. 2, n. 1) and that "[t]here is no necessity that the government prove that the defendant had an intention to defraud it, or to evade the payment of any taxes * * * " (*ibid.*). This instruction conforms with this Court's determination in *United States* v. *Bishop*, 412 U.S. 346, 360, that "the word 'willfully' in these [criminal tax] statutes generally connotes a voluntary, intentional violation of a known legal duty."[1]

3. Petitioner also errs in contending (Pet. 13-14) that the trial court erred in ruling that since petitioner was represented at the trial by two attorneys, he could not at the same time represent himself. The court below concluded that petitioner's "obvious motive was to be able to spout his notions [that the income tax is unconstitutional] to the jury without having to take the witness stand" (Pet. App. 4) and that the trial court properly limited petitioner's courtroom activities while offering him the opportunity to participate at some stages of the trial. These rulings were proper. Cf. *Lofton* v. *Procunier*, 487 F. 2d 434, 435 (C.A. 9); *Nelson* v. *People of the State of California*, 346 F. 2d 73, 81 (C.A. 9).

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[1]A panel of the Seventh Circuit has concluded, contrary to the court below, that willfulness in failure-to-file cases under Section 7203 involves an intent to defraud, but that case is now before the full bench of that Circuit on the government's petition for rehearing *en banc*. *United States* v. *McCorkle*, No. 73-1084, decided April 8, 1974, petition for rehearing *en banc* granted July 12, 1974.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.

1001-1974-08